SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 96

UNITED STATES OF AMERICA,

Petitioner,

v.

BUFFALO SAVINGS BANK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF BUFFALO SAVINGS BANK

JOHN HORACE LITTLE,
Attorney for Buffalo Savings Bank,
545 Main Street,
Buffalo 3, New York.

BATAVIA TIMES LAW PRINTERS
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Opinions Below

The first opinion of the Erie County Court is reported in 186 N. Y. S. 2d 960, 17 Misc. 2d 564 (Original 68, Print 37). The first opinion of the New York Supreme Court, Appellate Division, Fourth Department, is reported at 202 N. Y. S. 2d 70, 11 A. D. 2d 158 (Original 40, Print 19). The second opinion of the Erie County Court is reported at 206 N. Y. S. 2d 518, 26 Misc. 2d 443 (Original 29, Print 12). The second opinion of the New York Supreme Court, Appellate Division, Fourth Department, is reported at 215 N. Y. S. 2d 189, 13 A. D. 2d 207 (Original

115, Print 64). The opinion of the Court of Appeals of the State of New York is reported at 11 N. Y. 2d 31, 181 N. E. 2d 413 (Print 74).

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered February 22, 1962 (R. 91-92). The petition for a writ of certiorari was filed on April 30, 1962. The jurisdiction of this Court was invoked under 28 U. S. C. Section 1257 (3). Certiorari was granted June 11, 1962 (R. 93).

Questions Presented

Whether the United States, when it submits to the jurisdiction of a New York Court under the provisions of Title 28 U. S. C. 2410 (Appendix) in a mortgage foreclosure action, is bound by New York statutes as they define the mortgagee's interest in the mortgaged property after the execution of the mortgage as being subject to the right of the mortgagee to have real estate taxes and assessments paid out of the mortgaged property; and further whether it is bound by the provisions of the New York statutes which make real estate taxes and assessments paid by the referee expenses of sale, so that they are paid from the proceeds of the sale, before any amount thereof is paid either to the plaintiff mortgagee or to the United States on its tax lien; and further whether it is bound by the said statutes as they define surplus monies.

Statutes Involved

Sections 2670, 2671 and 2672 (a) (1) of Title 26 U. S. C., Internal Revenue Code. These sections were enacted imme-

terially by the 1954 Revenue Code and are now known as Sections 6321, 6322 and 6323 (a) (1), Title 26 U. S. C. Section 2410 of Title 28 U. S. C.; and Section 1444, Title 28 U. S. C.; and 1652 of Title 28 U. S. C.; Sections 1082 and 1087 of the New York Civil Practice Act; Sections 240 (2) and 290 (3) of the New York Real Property Law; Revised General Statutes of Connecticut, 1949, Sections 7208 and 7210, Title 58. In 1958 these sections were revised immaterially and are now known as Title 49, Chapter 846, Sections 49-25 and 49-29 General Statutes of Connecticut; and Sections 1626 and 1676 of the Code of Civil Procedure of the State of New York, predecessor to the New York Civil Practice Act, adopted by Chapter 178 of the Laws of 1880.

Statement

This is an action brought to foreclose a mortgage on real property. The mortgage was dated April 5, 1946, and recorded in Erie County Clerk's Office, New York, the same day (Original 58 and 61, Print 31 and 32). The United States of America was made a party defendant because of a tax lien which it filed in the Erie County Clerk's Office January 15, 1953 (Original 66, Print 36), subsequently to the date of the recording of plaintiff's mortgage (Original 61, Print 32). The United States was made a party defendant to this foreclosure action pursuant to the provisions of Section 2410, Title 28 U. S. C. (Appendix). None of the local municipal taxing authorities was a party to the action.

The Erie County Court made certain Findings of Fact and Conclusions of Law (Original 55, Print 29) and then on June 9, 1959, granted the first judgment of foreclosure and sale (Original 48, Print 24), which foreclosed the tax

lien of the United States from the mortgaged property, subject to the one year redemption period provided by 28 U. S. C. 2410 (c), and directed the referee appointed to conduct the foreclosure sale to sell the property subject to all unpaid real estate taxes and assessments pursuant to the provisions of Section 1087 of the New York Civil Practice Act (Appendix). On appeal, the New York Supreme Court, Appellate Division, Fourth Department, on July 1, 1960, reversed this judgment and remanded this case to the Erie County Court (Original 45, Print 23). Subsequently, a resettled judgment of foreclosure and sale was made by the Erie County Court on October 20, 1960 (Original 6, Print 3), which foreclosed the United States tax lien, subject to the one year redemption period provided for by 28 U. S. C. 2410 (c), and directed the referee appointed to conduct the foreclosure sale to pay the unpaid real estate taxes and assessments as expenses of the sale, pursuant to Section 1087 of the Civil Practice Act (Appendix). On appeal, the New York Supreme Court, Appellate Division, Fourth Department, by its order of May 18, 1961 (Original 108, Print 60), reversed the second judgment of the Erie County Court, dated October 20, 1960 (Original 6, Print 3), and directed that provisions should be inserted in the judgment providing that the referee appointed to sell the property bring the entire proceeds of the sale into court, and for the court to then order a distribution of such proceeds in the manner directed in the cases, United States vs. City of New Britain, 347 U. S. 81, 98 L. ed. 520, and Brown vs. General Laundry Service, 19 Conn. Supp. 335, 113 A. 2d 601. On appeal, the Court of Appeals, State of New York, by its order of February 22, 1962 (Print 91), reversed the order of the Appellate Division, dated May 18, 1961, and reinstated the judgment of the Erie County Court dated October 20, 1960 (Original

6, Print 3), which judgment provided for the payment of all real estate taxes and assessments as an expense of the sale before any moneys were allocated either to the plaintiff or the defendant, United States of America.

Summary of Argument

Buffalo Savings Bank adopts as a part of its argument all the reasoning contained in the majority opinion of the New York Court of Appeals.

This decision of the New York Court of Appeals is soundly based on two propositions, both recognized by this Court in previous cases.

The first of these is that after the execution of the mortgage, the mortgagor's ownership rights in the mortgaged premises, to which the federal tax lien attached, had been diminished by state law in that the mortgagee had a right to require that local real estate taxes and assessments be paid first from the proceeds of any foreclosure sale of the mortgaged property, and that the federal lien could only attach to such diminished property right of the taxpayer.

The second of these is that long-established New York mortgage foreclosure procedure making the payment of real estate taxes and assessments by a referee to sell on mortgage foreclosure an expense of the sale is binding on the United States when joined pursuant to 28 U. S. C. 2410 as a party defendant to cut off its tax lien.

U. S. v. City of New Britain, 347 U. S. 81, 98 L. ed. 520, is then distinguished and the applicability of U. S. v. Brosnan, 363 U. S. 237, 4 L. ed. 2d 1192, where this Court approved Pennsylvania mortgage foreclosure procedure which cut off the federal tax lien without payment and

provided for payment in full of real estate taxes and assessments is shown.

The relevance to this case of the Government's concession in Crest Finance Co. v. U. S., 368 U. S. 387, 7 L. ed. 2d 342, that the value of the property to which the federal lien attaches may vary in amount after the filing of the federal lien without affecting the choateness of the lien is shown. The intent of Congress when adopting 26 U. S. C. 3672 now 6323, which makes federal tax liens subordinate to prior recorded real estate mortgages and 28 U. S. C. 2410 which permits the joining of the United States as a party defendant to a state mortgage foreclosure action in order to cut off the federal tax lien, is shown by quotations from Congressional Reports at the time of their adoption.

Finally, the full rights of mortgagees as against subsequently filed federal tax liens is shown by a quotation from the dissenting opinion in U. S. v. Bond, Fourth Circuit, 279 F. 2d 827; and the narrowness of the issue in this case and how the New York Court of Appeals decision is not contrary to the holdings in any of the previous tax lien cases is shown.

POINT I

The federal tax lien attached to the mortgaged property subject to the right of the mortgagee to have local taxes paid out of the mortgaged property.

The mortgage involved in this action provided that "in case of default in the payment of the said sum of money, or of any part thereof, or the interest that might grow due thereon, or in the payment of taxes or assessments, the said plaintiff was thereby empowered to sell the said mortgaged premises according to law;" (Paragraph Fourth

Complaint: Original 80; Print 44-45; Erie County Court Decision, Finding of Fact 5; Original 60; Print 32). By statute in New York, a mortgage is defined as a conveyance. Real Property Law, Secs. 240 (2) and 290 (3) (Appendix). When the mortgagor executed the mortgage, he conveyed to the mortgagee the right, in the event of a default, to have the premises sold according to law. This law is found in Sections 1082 and 1087 of the New York Civil Practice Act (Appendix). Section 1082 of the New York Civil Practice Act states: that when a plaintiff in a foreclosure action becomes entitled to the final judgment "it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action" and Section 1087 of the New York Civil Practice Act directs the referee appointed to sell the foreclosed property to pay out of the proceeds of sale, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold * * * and states that "the sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article." These statutes were as much a part of the mortgage as though set forth in full therein. In Brine v. The Hartford Fire Insurance Company, 96 U. S. 627 (1878) this Court said at page 637:

> "All contracts between private parties are made with reference to the law of the place where they are made or are to be performed. Their construction, validity and effect are governed by the place where they are made and are to be performed if that be the same as it is in this case. It is, therefore, said that these laws enter into and become a part of the contract."

When the mortgagor herein executed his mortgage he thereby conveyed to the mortgagee the right to have any

unpaid local real estate taxes and assessments paid from the proceeds of a foreclosure sale of the mortgaged premises. By so doing he reduced his ownership rights in said mortgaged premises. When subsequently the federal tax lien was filed "the property and rights to property" belonging to him (26 U.S.C. 3670 now 6321 Appendix), had been reduced by the conveyance of this right to the mortgagee, and the federal tax lien attached only to this reduced ownership in the mortgaged property. Similar reductions by state law in the ownership rights of a taxpayer in his "property and rights to property" have been recognized by this Court as valid against a federal tax lien in U. S. v. Durham Lumber Co., 363 U. S. 522, 4 L. ed. 2d 1371; Aquilino v. U. S., 363 U. S. 509, 4 L. ed. 2d 1365; and U. S. v. Bess, 357 U. S. 51, 12 L. ed. 2d 1135.

POINT II

The New Britain case does not apply here.

The decision of the New York Court of Appeals in this case is not in conflict with the decision of this Court in the case of United States vs. City of New Britain, 347 U. S. 81, 98 L. ed. 520.

The New Britain case originated in the Superior Court of Hartford County, Connecticut, as a mortgage foreclosure action brought by Louis Brown against General Laundry Service, Inc. The action proceeded in the usual way until following the sale of the mortgaged premises a supplementary judgment was entered December 19, 1951, which directed payment from the proceeds of sale in the following order: the expenses of the sale, the taxes due the City of New Britain in full, the full amount due the mortgagee, Louis Brown, the full amount due William G. Dunn, a

judgment creditor whose judgment was docketed subsequently to the recording of the mortgages but prior to the filing of the federal tax liens, and lastly, the balance to the United States of America to apply on its tax lien. The United States of America appealed to the Supreme Court of Errors of the State of Connecticut, and the City of New Britain, which had not up to this point been a party to the action, intervened to contest the appeal. The sole question raised in the Supreme Court of Errors was as to the relative priority of the lien of the taxes due the City of New Britain and the lien of the federal taxes, and the only parties who appeared on the appeal were the City of New Britain and the United States of America. The Supreme Court of Errors of the State of Connecticut affirmed the judgment of the Superior Court of Hartford County. The United States of America then petitioned this Court for certiorari, which was granted. The sole question raised in this Court was again the same relative priority of municipal and federal tax liens and again the only parties present were the City of New Britain and the United States of America. The mortgagee and the judgment creditor took no part in the proceedings in either court, and thus were not present to object to any form of judgment which might purport to give effectual priority to the federal liens over the mortgagee and judgment creditor contrary to the provisions of Section 3672 now 6323, of Title 26 U. S. C. (Appendix).

It was not until the case went back to the Superior Court of Hartford County, on remand from this Court, as Brown vs. General Laundry Service, Inc., 19 Conn. Sup. 335, 113 A. 2d 601, that the question of "circular priority" entered the case to reduce the amount previously set aside for the judgment creditor, William G. Dunn, in order to pay in

full the federal tax lien. This was not because this Court had directed any such reduction. It was because the Connecticut Court held that Connecticut foreclosure procedure required such a reduction in order to comply with the decision of this Court. New York foreclosure procedure does not require the same result.

Mortgage foreclosure procedure in Connecticut differs from that in New York in that in Connecticut the entire proceeds of a foreclosure sale are brought into Court and thereafter a supplemental judgment is rendered, specifying the parties who are entitled thereto and the amount to which each, including the plaintiff, is entitled. Sections 7208 and 7210, Title 58, Revised General Statutes of Connecticut, 1949, predecessor to 49 Conn. Gen. Statutes, Chapter 846, Secs. 49-27, 49-29, revised 1958 (Appendix). In Julia M. W. Gault vs. Jason Bacon, 142 Conn. 200, 113 A. 2d 145, it is stated:

> "The decree of foreclosure by sale should not adjudicate the rights of the parties to the funds realized; those rights should be determined by way of a supplemental judgment. City National Bank vs. Stoeckel, 102 Conn. 732, 744; 132 A. 20."

In Connecticut, this supplemental judgment directs the payment of local taxes from the proceeds of sale at the same time it adjudicates the rights of the parties including the plaintiff and all defendants in the same proceeds of sale. Brown v. General Laundry Service, Inc., 79 Conn. Sup. 235, 113 A. 2d 601.

New York procedure is different. There Section 1082 of the Civil Practice Act provides for a sale of the mortgaged property, or so much thereof as is necessary to discharge the mortgage debt, the expenses of sale, and the costs of the action, and directs that all surplus moneys arising from the sale shall then be deposited within five

days after the sale subject to the further order of the Court; and Section 1087 of the Civil Practice Act defines as an expense of the sale the payment of taxes, assessments and water rates which are liens on the mortgaged property or the payment of such sums as are necessary to redeem the property sold from any sale for the unpaid taxes, assessments or water rates, and provides that the Court shall direct the referee to pay said taxes; unless, the Court, in its discretion, directs that said property be sold subject to said taxes.

In Connecticut the real estate taxes and assessments are paid because they are liens on the mortgaged property, while in New York they are paid as expenses of the foreclosure sale. There is nothing in U. S. v. City of New Britain which prohibits the payment of expenses of sale before the federal lien. Brown v. General Laundry Service, 19 Conn. Supp. 335, 113 A. 2d 601, recognized that expenses of sale had priority when it directed their payment prior to the payment of any moneys to the City of New Britain, the United States or to the plaintiff, Louis Brown.

This New York practice far antedates any federal tax lien statutes and questions arising therefrom. Section 1082 of the New York Civil Practice Act is derived from Section 1626 of the New York Code of Civil Procedure adopted by Chapter 522 of the Laws of New York of 1880, and Section 1087 is derived from Section 1676 of the Code of Civil Procedure adopted by Chapter 522 of the Laws of New York of 1880. Sections 1626 and 1676 of said Civil Code of Procedure, as adopted in 1880, are set forth in the Appendix.

As the New York Court of Appeals stated, the local taxing authorities in this case are not competing with the

United States for payment from the same fund. No question of "circular priority" arises. The local taxes will be paid as an expense of sale before the surplus from which the United States lien must be paid is created. The United States is bound by this procedure when joined as a party defendant in a foreclosure action in a New York state court by virtue of the provisions of Section 2410 U. S. C. 28 (Appendix). It would be equally bound by the same procedure by virtue of Section 1652 U. S. C. 28 (Appendix) if it removed the state court case to the federal district court pursuant to Section 1444 U. S. C. 28 (Appendix).[1]

[1] Prior to the decision in Erie Railroad Company vs. Tompkins, 304 U. S. 64 (1938), Section 1652 Title 28 U. S. C. was held to apply only to the statute laws of the several states. Mr. Justice Brandeis in that case stated: "Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The principle of Erie Railroad Company v. Tompkins, 304 U. S. 64, an action at law, was applied to a suit in equity in Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202.

In the early cases after Erie Railroad Company vs. Tompkins, the rule was applied only to substantive law. Guaranty Trust Co. vs. York, 326 U. S. 99 (1945), removed that distinction. Since Guaranty Trust Company vs. York *supra*, the distinguishing point is not whether the state law relates to practice or substantive law. The important point is that if the state law, be it practice or substantive law, is not applied in a federal court, a different result will ensue in the federal court sitting across the street from the state court.

While the opinion in the Guaranty Trust Co. case discusses the applicability of this rule in diversity of citizenship cases, the courts have not confined the rule to diversity of citizenship cases.

In Wichita Royalty Company vs. City National Bank of Wichita Falls, 306 U. S. 103, it was applied in a case removed from a Texas State Court to a federal district court. Mr. Justice Stone in that case stated: "In departing from the law of the case, as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, *supra*."

In Continental Casualty Co. v. Schaefer, 173 F. 2d 5 (1949) it was applied when federal jurisdiction was conferred by the Miller Act.

(Footnote continued on following page)

POINT III

The Brosnan case does apply.

Since the mortgagee and judgment creditor were not parties to the New Britain case in the Supreme Court and only the City of New Britain and the Government were present, all statements in that case which would suggest that local taxes must come out of the mortgagee's share are *obiter dicta* contrary to the later direct holding by this Court in U. S. v. Brosnan, 363 U. S. 237, 4 L. ed. 2d 1192, that local taxes can be paid in a foreclosure action as an expense of the sale.

New York and Connecticut foreclosure procedure not only differ from each other, but also differ from Pennsylvania foreclosure procedure, as described and approved of by this Court in United States vs. Brosnan, 363 U. S. 237, 4 L. ed. 2d 1192. However, New York and Pennsylvania procedures have one thing in common, *i.e.*, the United States tax lien is foreclosed and divested from the mortgaged property without any payment of the federal lien, in a judicial foreclosure action which also provides the payment in full of local taxes and assessments as a part of the foreclosure action. This fact was brought

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(Footnote continued from preceding page)

In Chase National Bank of City of New York vs. Directorate General of Postal Remittances & Savings Bank, 95 F. Supp. 733, in 1951, it was applied in a case removed from the state court to the federal district court because one of the parties was a national bank.

In Howard vs. Hudson, 259 F. 2d 29 (1958), it was applied in a case removed to a federal court because a defendant was an officer of an agency of the United States.

The holding in Guaranty Trust Co. vs. York, 326 U. S. 99, that the Erie R. Co. vs. Tompkins rule applied to the adjective as well as substantive law has been applied in a number of cases. In Ragen vs. Merchants Transfer & Warehouse Company, 337 U. S. 530 (1949), a state statute of limitation was applied. In Woods vs. Interstate Realty Company, 337 U. S. 535 (1949), the suit in the federal court was dismissed because the foreign corporation had not complied with the state law requiring it to designate an agent on whom service of process could be made.

to this Court's attention in the Government's brief in the Brosnan case. The pertinent portion of the Government's brief is quoted at length in the majority opinion of the New York Court of Appeals, 11 N. Y. 2d 31, 41 (Print 80-1), as follows:

> "Indeed, Pennsylvania law itself treats state tax liens more favorably than federal tax liens. A Pennsylvania statute provides that 'The lien of all taxes * * * against any real estate within this Commonwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes' (Purdon's Penna. Statutes Annotated, Title 53, Section 7104, Appendix, *infra*, page 36). While Pennsylvania law permits discharge of a junior lien on realty through foreclosure of a prior mortgage at a sheriff's sale, the Commonwealth's liens may be divested only to the extent permitted by statute (cases cited). Thus, under Pennsylvania law the state's tax lien will be discharged through foreclosure only if the state's tax claim is paid in full out of the proceedings. The decision below holds, however, that the same foreclosure proceeding wipes out the federal lien even though the United States received not a single penny toward payment of its claim."

The fact was also mentioned in the opinion of the Circuit Court of Appeals in the Brosnan case, 264 Fed. 2d 762, where at page 764 the following statement appears: "The amount of the bid went to satisfy costs of the sale, and for various outstanding local taxes." Yet with knowledge of this fact, this Court did not consider it a sufficiently valid objection to Pennsylvania mortgage foreclosure procedure to merit mention of it in its opinion. Judge Fuld's statement in the dissenting opinion in the New York Court of Appeals, 11 N. Y. 2d 31, 50 (Print 89-90): "In the second place, although local taxes had been paid out of the proceeds of the mortgage sale and thus had, in effect, achieved priority, that issue was never raised on

appeal * * * is erroneous if by it he meant it was not called to this Court's attention, and unconvincing if he meant it was not made a point of argument by the Government. Since the payment of local property taxes from the proceeds of sale is such an integral, inseparable, and important feature of Pennsylvania foreclosure procedure, it is inconceivable that this Court did not give it due consideration in reaching its decision.

This Court did say in the Brosnan case, 363 U. S. 237, at page 242: "We believe that, so far as this Court is concerned, the need for uniformity (in the collection of federal taxes) in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures." The application of the dicta in the New Britain case which the Government claims to exist and asks to have applied here, would severely upset long established property rights in New York State, and put New York mortgagees in a less advantageous position than their counterparts in Pennsylvania and in those states which permit non-judicial foreclosures (Bank of America National Trust and Savings Association v. United States, 363 U. S. 237, 4 L. ed. 1192) since New York mortgagees, through the "circular priority" theory advanced by the Government here, would have to pay local taxes from their share of the sale proceeds.

POINT IV

The Crest Finance Co., Inc. case applies here.

In Crest Finance Co., Inc. vs. United States, 368 U. S. 387, 7 L. ed. 2d 342, this Court stated that in view of the Solicitor General's concession that petitioner's lien was choate, and the Court agreeing therewith, certiorari was

contract and the judgment vacated. The question involved in the Crest Finance Co., Inc. case was whether the lien competing with the federal tax lien was choate because the property to which the lien attached was not definite. There the Government's brief states that Crest Finance Co., Inc. and the United States were claimants to a fund owed by Standard to the Twin Excavating Company, Inc. and the facts are as follows at pages 2 and 3:

> "Standard was the prime contractor for the construction of a certain portion of the Illinois Toll Road in the neighborhood of Harvey, Illinois. On September 20, 1956, the taxpayer entered into a subcontract with Standard for hauling and compacting excavated dirt. Under the terms of the contract, Standard agreed to make progress payments to the taxpayer for work performed, based upon estimates covered by weekly reports or invoices, predicated on a count of the number of loads of fill carried to the site of the construction. All the invoices contained the statement that the estimates were subject to revision as to the actual amounts by the project engineer. (R. 20.)
>
> "From March 21, 1958, through June 10, 1958, the petitioner made nine loans to the taxpayer totaling $[illegible]. The loans were evidenced by the taxpayer's note and were secured by concurrent assignments of the taxpayer's right to payment from Standard for the work performed up to the date of each assignment as estimated by the weekly invoices."

The applicability of the Crest Finance case to our case is stated precisely in the Government's memorandum at page 6:

> "That the amount owing to the taxpayer by Standard for the work performed was, at the date of the tax assessments, still subject to final computation and to minor changes that were believed, affect the definiteness or specificity of the petitioner's lien. The property subject to the lien was the specific right to payment for work performed, and the indefiniteness of the amount due for that work goes only to the definiteness

of the lien (which was for the liquidated amount of the notes evidencing the loans from petitioner to the taxpayer), but to the value of the property subject to the lien. *Just as a mortgage on real estate is not made inchoate because the value of the property covered the mortgagor's title to it is uncertain, so the petitioner's lien on the taxpayer's contractual right to payment for work performed is not made inchoate because the amount payable on the assigned right has not been finally ascertained. The requirement of definiteness of amount goes only to the debt secured by the lien, not to the property (otherwise specifically identified) that is subject to the lien.*" (Emphasis Supplied)

From this concession, it follows that there can be no objection in this case to the fact that the mortgagor's equity in the mortgaged premises varies in value, by decreasing as real estate taxes and assessments are levied against the mortgaged property, pursuant to an established tax rate, after the filing of the federal lien.

POINT V

The affirmance of the New York Court of Appeals Decision would be in accordance with the intent of Congress when it adopted Section 3672, now 6323, Title 26 U. S. C.; and Section 2410, Title 28 U. S. C.

Section 3672, now 6323, Title 26 U. S. C. (Appendix), provides that the federal tax lien imposed by Section 3670, now 6321, Title 26, shall not be valid against any mortgagee, * * * until notice thereof has been filed by the Secretary or his delegate. It is this Section which makes Buffalo Savings Bank's mortgage, recorded prior to the filing of the federal tax lien in this action, a prior lien to the federal tax lien. Section 2410, Title 28, U. S. C. (Appendix), is the enabling statute by which Buffalo Savings

Bank was permitted to join the United States as a party defendant in this foreclosure action for the purpose of cutting off this federal tax lien. The predecessor to Section 3672 now 6323, was enacted by Congress in 1913. The House of Representatives Report on this bill No. 1018, 62nd Congress, 2d Session; July 17, 1912 (Appendix), contains the statement in the second last paragraph: "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."

At the time the predecessor to the present Section 2410, U. S. C. 28, was adopted, House of Representatives Report on this bill No. 95, 71st Congress, 2d Session, dated December 21, 1929, stated at the bottom of the third paragraph that this Section was enacted because of the then existing situation where "He (the mortgagee) is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien; a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment."

Despite these expressions of Congressional intent the Government in this case asks that its tax lien be given better treatment than the lien of an individual and definitely seeks to collect its tax from one (the mortgagee) who does not owe it.

It should be noted that Section 3672 now 6323, does not state that the federal lien shall not be valid as against any *mortgage* until filed as therein provided, but says such lien shall not be valid as against any *mortgagee* "until notice thereof has been filed as therein provided." It is the *mortgagee* that Congress intended to protect and not the

mortgage. Circuit Judge Haynsworth in his dissenting opinion in the case of U. S. vs. Bond, 279 F. 2d 837 (May 31, 1960) at pages 851 and 852, although he is discussing the right of a mortgagee to advance money to pay taxes and add the amount advanced to the principal of its mortgage, nevertheless has some interesting observations on Congressional intent on adopting this statute, and on the distinction in the use of the word *mortgagee* rather than *mortgage* when he says:

> "If the decision in Ball Construction has not foreclosed the present question, and it seems to me far from certain that it has, it is incumbent upon us to focus our attention upon the statute which confers a preference upon a 'mortgagee' and to inquire whether the statute should be so construed as to withhold preferential treatment from one, indisputably a mortgagee, to the extent the mortgage debt is uncertain in amount or not fully accrued when the tax lien is recorded.
>
> "This, the crucial question, need not detain us long. If our view of the statute be not obscured by rules developed for the deferment of unpreferred interests, it seems clear that the words of the statute were used in their 'usual, conventional sense.' (U. S. vs. Gilbert Associates, Inc., 345 U. S. 361, 97 L. ed. 1071). The Congress did not prefer the principal of the mortgage debt; it preferred the mortgagee. If the word is to be given its usual meaning the preference cannot be limited to the mortgagee's right to repayment of the principal of the mortgage debt. It extends to all those rights which the Congress must have known the mortgagee commonly and usually possesses.
>
> "Provisions in mortgages requiring or permitting the mortgagee to discharge ad valorem tax liens and extending the mortgage lien to such disbursements, as well as to the expense of enforcement of the mortgagee's rights, are commonplace. There is nothing novel in recognition of the fact that the protection of the mortgage lien extends to such disbursements and

expenses, made pursuant to such provisions, as fully as to the principal of the mortgage debt itself. It is a usual and conventional right of a mortgagee. When Congress created the preference, such rights of the mortgagee were generally recognized in commerce and in law. If we are to give the language of the statute its usual and ordinary meaning, we cannot deny to the mortgagee his usual and ordinary rights. Since the statute confers the preference upon the mortgagee, it seems to require us to recognize the preference, at the least, to the extent that his preference has been traditionally and commonly recognized in the state courts. I see no reason to suppose that Congress intended the preference it commanded to differ in kind and quality from the preference the selected classes have enjoyed historically and, in commercial circles, are generally thought to have.

"While the question is novel in this court, and, I believe, open in the Supreme Court, there are analogies that bear mention.

"A mortgagee's collection out of the security of attorney's fees incurred after the mortgagor's adjudication in bankruptcy was resisted upon the ground that the claim was contingent at the time of adjudication and, therefore, not provable. The Supreme Court held there was no need to prove the claim for the right to attorney's fees was fully protected by the mortgage lien from the time that lien first attached. (Security Mortgage Co. v. Powers, 278 U. S. 149, 73 L. ed. 236.) In the opinion it was said, 'The lien was not inchoate at the time of the adjudication.'

"This Court dealt with a similar problem when attorney's fees were incurred by a mortgagee after forfeiture of the mortgaged vehicle to the United States. (United States v. Seaboard Citizens Nat'l Bank of Norfolk, 4 Cir., 206 F. 2d 62.) We held the right to attorney's fees fully protected from the date the mortgage lien attached, saying, 'The lien for attorney's fees was not inchoate at the time of the offense.'

"As the rules have been developed in the tax lien cases, the claim for attorney's fees was inchoate when

the tax lien attached. Perhaps we may say as the Supreme Court said in the bankruptcy case that the lien which supports the claim was not inchoate. Whether we do or not, we should reach a similar result here, for no valid reason appears for reading limitations into the preference statute which the language of the statute does not contemplate.

"The specific question has arisen in other courts.

"The mortgagee has been held preferred with respect to attorney's fees and similar expenses incurred after the tax lien was recorded (U. S. v. Halton Tractor Co., 9 Cir., 258 F. 2d 612) and with respect to state taxes paid by the mortgagee. The mortgagee's preference with respect to accruing interest has been generally recognized. (U. S. v. Halton Tractor Co., 9 Cir., 258 F. 2d 612.) Perhaps the right to interest accruing at an agreed rate could pass the inchoate test, *but to a substantive recognition of the mortgagee's preference, his right to be secure in his income is hardly so important as his right to be secure in making disbursements necessary for the protection or preservation of the mortgage lien and for the collection of the principal of the mortgage debt.*" (Emphasis Supplied.)

Buffalo Savings Bank agrees with all of Judge Haynsworth's interpretations of the intent of Congress in enacting this Section (3672 now 6323, Title 26 U. S. C.). However, it is not necessary for this Court to adopt all of them in order for it to affirm the New York Court of Appeals' judgment in this case.

All Buffalo Savings Bank seeks to recover here is the unpaid balance of the original principal sum of its mortgage. It did not advance any money for taxes which it seeks to add to the principal of its mortgage. For that reason, U. S. vs. Bond, Fourth Circuit, 279 F. 2d 837, and U. S. vs. Christensen, Ninth Circuit, 269 F. 2d 624, cited in Judge Fuld's dissenting opinion have no application here

because they deal with the inchoateness of claims for tax advances after the filing of the federal tax lien.

There is no dispute here about Buffalo Savings Bank's mortgage being a valid mortgage recorded prior to the filing of the federal tax lien. For that reason, U. S. vs. Gilbert Associates Inc., 345 U. S. 361, and U. S. vs. Acri, 348 U. S. 211, dealing with state attempts to label as a mortgage or judgment a lien not a true mortgage or judgment so that it will come within the provisions of 3672, now 6323, U. S. C., 26 have no application here.

Some statements in the Government's Brief must be challenged. One is on page 7 thereof as follows: "It is the New York Court of Appeals' position that the State tax liens attach directly to this property while the federal tax lien attaches only to the taxpayer's interest in the property. But this distinction is directly contrary to the settled decisions of this Court. The law established by this Court holds that the federal tax lien attaches to the property itself, exactly as a state tax lien (*e.g.*, Michigan v. United States, 317 U. S. 338) and take priority over all subsequently attaching liens." Michigan v. United States does not so hold. All it says is that when a federal tax lien has attached to property it cannot be displaced by a subsequent lien made prior by state law. Aquilino v. U. S. (*supra*) and U. S. v. Durham Lumber Co. (*supra*) specifically held that the federal tax lien attaches only to the taxpayer's interest in the property.

In City of New York v. United States, 283 F. 2d 829 (1960), Chief Judge Lumbard at page 832 states:

> "The Section 6321 lien attaches only to the extent of the taxpayer's property interest, United States v. Bess, 357 U. S., 1958, 175 F. 2d 196, and is not a proper basis for a lien on contingent rights before they come

into being. United States v. Long Island Drug Co., 2 Cir., 1940, 115 F. 2d 983. Thus, the property, after it had been assigned by the taxpayer, could not be subjected to the government's lien."

In Metropolitan Life Ins. Co. v. United States, 107 F. 2d 311, Sixth Circuit (1939), Cert. denied 310 U. S. 630, Circuit Judge Arant in his dissenting opinion at page 314 states:

"The lien of the United States involved herein was based upon an income tax, not a property tax, and attached only to 'property and rights to property, whether real or personal, belonging to' the tax debtor. R. S. Sec. 3186, U. S. C., title 26, Sec. 1560, 26 U. S. C. A. Section 1560."

In United States v. Cox, 119 F. Supp. 147, District Court, Northern District of Georgia (1953), at page 151, District Judge Sloan stated:

"The lien of the government attached to all of the property in possession of the taxpayer to the extent of his interest and right thereto. (Metropolitan Life Ins. Co. v. U. S., 6 Cir., 107 F. 2d 311, 313.)"

In United States v. Winnett, 165 F. 2d 149, at page 151, Circuit Judge Orr stated:

"* * * the rights of the Collector do not extend beyond those of the taxpayer whose right to property is sought to be levied upon."

To the same effect are F. H. McGraw & Co., Inc. v. Sherman Plastering Co., Inc., 60 F. Supp. 504 (1943), affirmed 149 F. 2d 301, Cert. denied 326 U. S. 753; United States v. Hutcherson, 188 F. 2d 326; Central Surety and Insurance Corporation v. Martin Infante Co., Inc., 164 F. Supp. 923, affirmed 272 F. 2d 231; and United States v. Graham, 96 F. Supp. 318 (1951), affirmed 243 F. 2d 919.

The statement on page 23, "Sections 1082 and 1087 of the New York Civil Practice Act do not establish pro-

cedures for the divestiture of liens or for any other purpose. They deal with the order of payment of claims, a substantive matter of priorities which Brosnan makes clear is governed not by state law but by Section 3670 as interpreted in New Britain, 363 U. S. at 240-244." is refuted by the Brosnan case itself. The provision for the payment of real estate taxes from the foreclosure sale proceeds is set forth in the Pennsylvania statutes cited in the Government's Brief in Brosnan (R. 81), but as the payment thereof from the sale proceeds is set forth in Section 1087 of the New York Civil Practice Act. If such direction for payment was deemed procedural in Pennsylvania practice, it follows it must be procedural and not substantive in New York practice.

The comment on page 9 brings in extraneous matter when it says, "There is no showing here that the federal lien so established has overburdened either municipalities or mortgagees." It is true the Record in this case does not show it, but the statement is hardly justified by the facts. In every mortgage foreclosure in New York State where there was a federal tax lien on the mortgaged property filed subsequently to the recording of the mortgage, the Government has sought to have its tax lien paid at the expense of the mortgagee under its theory of "circular priority". There are literally hundreds, if not thousands, of these cases, and they have indeed overburdened mortgagees and have given municipalities nothing they would not otherwise have had. The effect of this has been to encourage mortgagees to immediately institute foreclosure proceedings on a default, when sometimes some delay would have permitted the mortgagor to re-establish himself and save his home.

Unless this Court, at this time, wishes to expressly reverse them, all [redacted] cases cited by the Government, includ-

ing the New Britain case, will remain undisturbed by an affirmance of the New York Court of Appeals judgment in this case.[1] The principle of first in time, first in right; and the superiority of federal tax liens over state levied taxes will remain undisturbed.

The Government's argument here is based on an interence drawn from this Court's opinion in the New Britain case and not on any express statement in that opinion. All this Court said there was, "The United States is not interested in whether the State recovers its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgagee and judgment creditors Congress intended to assert the federal lien." It was the Connecticut Court on remand (Brown vs. General Laundry Service, Inc., 19 Conn. Supp. 335, 113 A. 2d 601) which said Connecticut foreclosure procedure re-

[1] Buffalo Savings Bank has chosen to argue this case without challenging the essential principle enunciated in U. S. vs. City of New Britain *supra*, on the reason that it believes the contractual right given it by the mortgage to have the real property taxes paid from the proceeds of a foreclosure sale, and New York foreclosure procedure either directing a sale subject to the local real estate taxes, or requiring the payment of the local real-estate taxes as an expense of the sale, are ample grounds for an affirmance by this Court of the New York Court of Appeals judgment.

However, it can be argued that since this Court in Aquilino vs. U. S., 363 U. S. 509, and U. S. vs. Durham Lumber Co., 363 U. S. 522 has recognized the right of a state by statute to diminish the ownership rights of a taxpayer in real property so that the federal tax lien attaches only to the diminished ownership, it follows that this Court should recognize the right of a state by statute to authorize the annual levying of real estate taxes and assessments to cover the cost of essential services to protect and maintain the real property, which as they are levied diminish the ownership rights of the taxpayer. (These statutes are set forth in Appendix to the Brief of the United States.) The ownership rights are so diminished by the taxes that the owner can only convey his interest in the property subject to their burden regardless of whether there is a mortgage or a federal tax lien on the property. Such recognition would, of course, amount to a repudiation of the New Britain doctrine.

Also, once this principle is recognized the basis for the decisions in U. S. vs. Reed, 270 F. 2d 837, and U. S. vs. Christensen, 269 F. 2d 624, is removed and the right of the mortgagee, after the filing of a federal tax lien, to advance money to pay taxes and add the amount of the advance to his mortgage debt is restored.

Such an interpretation would also assure mutuality of the rights of mortgagees in all of the states.

quired that the state taxes be paid from the sale proceeds, and reduced the share of the judgment creditor in said proceeds so that the federal lien and the state taxes could both be paid in full. If Connecticut mortgage foreclosure procedure had permitted it to do so, the Connecticut court on remand would have complied with this Court's directions if it had ordered that the mortgagee and judgment creditor be paid in full but that no part of the sale proceeds be used to pay municipal taxes until the federal lien was paid in full. Under this procedure the City would still have received its tax money, because the purchaser, after the sale was completed, would have had to pay these taxes if he wanted to avoid losing the property through a subsequent tax foreclosure.

Since New York procedure does not require that state taxes be paid from the sale proceeds, but permits a foreclosure sale subject to real estate taxes, the first judgment of the Erie County Court of June 9, 1959, so directing (Original 48, Print 24) was a proper one not at variance with the New Britain doctrine. The Appellate Division, Fourth Department, adopted the Government's erroneous inference when by its order of July 1, 1960 (Original 45, Print 23), it reversed this judgment because as it said (Original 42, Print 20): "The amount realized upon the sale would undoubtedly reflect the fact that the property had been sold subject to the lien of the local taxes and the proceeds of the sale available for the payment of all other liens, including the federal tax lien, would be accordingly reduced."

Since in granting certiorari, this Court has taken the whole case for consideration, Buffalo Savings Bank respectfully requests it to pass on the propriety of this first judgment of June 9, 1959.

It is Buffalo Savings Bank's contention that the proper interpretation to be given New Britain is that when competing for payment from the same fund at the same time, the federal lien must be paid before state taxes. This logical interpretation would then permit a foreclosure sale subject to real estate taxes, or permit the real estate taxes to be paid as an expense of the sale, when state foreclosure procedure does not prohibit it. It gives the federal tax lien priority over state taxes without subordinating the mortgage to the federal lien contrary to the expressed intention of Congress.

This Court in affirming the New York Court of Appeals judgment will merely be reaffirming the right of a state to define the property interest to which federal tax liens attach. Aquilino vs. U. S. (*supra*). U. S. vs. Durham Lumber Co. (*supra*), and acknowledging that New York State foreclosure procedure is equally binding on the United States as Pennsylvania foreclosure procedure. U. S. vs. Brosnan (*supra*).

CONCLUSION

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

JOHN HORACE LITTLE,
Attorney for Buffalo Savings Bank.
545 Main Street,
Buffalo 3, New York

APPENDIX

Title 26 United States Code, 1939 Code

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of Lien without Notice.—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) Under State or Territorial laws.—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory;

Appendix

Title 26 United States Code: 1954 Code. —

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) Invalidity of lien without notice. Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws. In the office designated by the law of the State or Territory in which the property subject to the lien is situated.

whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

Title 28 United States Code:

Sec. 1441. Removal of Actions Against United States

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending.

Title 28 United States Code:

Sec. 1652. State Laws as Rules of Decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Title 28 United States Code:

Sec. 2410. Actions Affecting Property on Which United States Has Lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the

United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States.

unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(j) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall recommend to the Comptroller General who may issue a certificate releasing the property from such lien.

Appendix

New York Civil Practice Act:

Sec. 1082. Final Judgment; Surplus Moneys

1. In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action except as provided in subdivision two of this section. All surplus moneys arising from the sale of mortgaged premises under any judgment shall be deposited by the officer appointed to conduct the sale of the premises within five days after the same shall be received and be ascertainable to the credit of the action in a bank or trust company named by the court in the final judgment unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are made specially by the court. Any person claiming the surplus moneys arising upon the sale of mortgaged premises, or any part thereof, either in his own name or by his attorney at any time before the confirmation of the report of sale, may file with the clerk in whose office the report of sale is filed a written notice of such claim, stating therein the nature and extent of his claim and the address of himself or his attorney. A motion to confirm such report of sale shall not be made within three months after the filing of the report and shall in any event be made not later than four months after the filing of such report, except that if

there be no surplus moneys arising from the sale of the mortgaged premises under such judgment, an application for confirmation of the report of sale may be made at any time after the report shall have been filed eight days. Where the report of sale shows surplus money the party moving for confirmation of the report of sale shall present with his motion papers a proper voucher for the surplus moneys showing that they have been paid over, deposited or disposed of in pursuance of the judgment, a certificate of the clerk specifying the notices of claim to the surplus moneys, if any, so filed with him, and an affidavit showing any other unsatisfied lien on the property. Where it appears to the court, on such motion for confirmation of the report of sale, that the owner of the equity of redemption in the action is entitled to all of the surplus moneys, and is the only person claiming the same, it may order that such surplus moneys shall be paid over to such owner or his assigns by the officer appointed to conduct the sale of the premises, without further proceedings. Where it appears on such motion that the owner is not the only person claiming such surplus, the court shall direct the sheriff or referee making the sale, within five days after such order is made, to pay such surplus moneys in the city of New York to the treasurer of the said city, and in other counties outside of the city of New York, to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court. In case of the death, disability, or removal of the officer appointed to conduct the sale of the premises, the court may

grant an order authorizing the bank or trust company in which such surplus moneys are deposited to pay them over to the person or persons entitled thereto.

SEC. 1087. PAYMENT OF TAXES, ASSESSMENTS AND WATER RATES OUT OF PROCEEDS OF SALE.

Where a judgment rendered in an action to foreclose a mortgage upon real property directs a sale of the real property, the officer making the sale must pay out of the proceeds, unless the judgment otherwise directs, all taxes, assessments and water rates which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale within the meaning of that expression as used in any provision of this article. The provisions of this section shall not apply to any judgment in an action wherein any municipal corporation of this state is the plaintiff and the purchaser at the foreclosure sale thereunder.

New York Real Property Law:

SEC. 240. DEFINITIONS AND USE OF TERMS.

2. The term "conveyance", as used in this article, includes every instrument, in writing, except a will, by which any estate or interest in real property is created, transferred, assigned or surrendered.

SEC. 290. DEFINITIONS; EFFECT OF ARTICLE.

3. The term "conveyance" includes every written instrument, by which any estate or interest in real

property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument postponing or subordinating a mortgage lien; except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property.

Section 1626 of the Code of Civil Procedure of the State of New York, predecessor to Section 1082 of the New York Civil Practice Act, as adopted by Chapter [illegible] of New York Laws of 1880:

In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

Section 1676 of the Code of Civil Procedure of the State of New York, predecessor to Section 1087 of the New York Civil Practice Act, as adopted by Chapter 178 of New York Laws of 1880:

Where a judgment, rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, an

less the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale, within the meaning of that expression, as used in any provision of article second, third or fourth of this title.

Revised General Statutes of Connecticut, 1949; Title 58:

Sec. 7208. Disposal of Proceeds of Sale.

The proceeds of each such sale shall be brought into court, there to be applied if the sale be ratified, in accordance with the provisions of a supplemental judgment then to be rendered in such cause, specifying the parties who are entitled to the same and the amount to which each is entitled; and, if any part of the debt or obligation secured by the mortgage or lien foreclosed or by any subsequent mortgage or lien was not payable at the date of the judgment of foreclosure, it shall nevertheless be paid as far as may be out of the proceeds aforesaid as if due and payable with rebate of interest where such debt was payable without interest, provided, if the plaintiff be the purchaser at any such sale, he shall be required to bring into court only so much of such proceeds as shall exceed the amount due upon his judgment debt, interest and costs.

Appendix

SEC. 7210. EXPENSES OF SALE AND COSTS

The court shall order the judgment and costs of the plaintiff to be first paid out of the proceeds of such sale and shall allow, to such of the parties as receive the balance of such proceeds, the costs usually allowed to successful parties, which costs shall be paid in addition to their respective claims and in the same order.

House of Representatives Report 1018, 62nd Congress, 2d Session:

LIEN FOR TAXES.

July 17, 1912. Referred to the House Calendar and ordered to be printed.

Mr. Sterling, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 25780.)

The Committee on the Judiciary, to whom was referred the bill (H. R. 25780) to amend section 3186 of the Revised Statutes of the United States, report the same to the House with a recommendation that it do pass.

Section 3186 of the Revised Statutes is as follows:

"SEC. 3186. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United

States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property, belonging to such person.

This section makes any delinquent tax due the United States a lien on all the property of the person delinquent in the payment of the tax, wherever it may be situated within the United States. A person proposing to buy the property of another could protect himself against such a lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors. It is proposed to amend the section by adding the following:

Provided, however, That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditors until notice of such lien shall be filed by the collector in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to such lien is situated: Provided further, That the provision herein relating to the filing of notice shall be applicable whenever, and only whenever, the laws of the State wherein the property is situated shall authorize the filing of such notice in the office of the registrar or recorder of deeds as provided herein.

The amendment becomes effective in any State only when the legislature of that State authorizes the filing of notice of such lien by the collector in the office of the registrar or recorder of deeds of the county or parish where the property is situated.

It provides a very simple means of giving this notice that would not at all be burdensome upon the Government.

In the case of the United States v. Snyder (149 U. S. 210) the Supreme Court held that the lien created by section 3186 is a valid and binding lien even against a bona fide purchaser or encumbrancer in good faith for value, without knowledge or notice of the existence of such a lien. The Federal statute makes no provision for giving notice, constructive or otherwise, of the lien created by said section, and in the case above cited it was held that the recording acts of the several States have no force or effect as against the lien of the Government; and the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person who has at any time owned the real estate in question has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.

The recent act relating to excise tax by corporations makes it imperative that some legislation of this kind be enacted in order to protect the transfer of property and to facilitate business transactions. *There is no reason why the Government should not occupy the same position with reference to liens as property as does the individual.* (Emphasis Supplied).

It is believed that the States will very readily pass legislation authorizing the filing of notice in the office of the registrar or recorder of deeds, in order to protect its citizens in business transactions against liens which the citizens can not know of except at great cost of money and time. This law simply gives the States the opportunity to do so if it wishes to save its citizens from this unnecessary burden.

House of Representatives Report 95, 71-t Congress, 2nd Session:

TO PERMIT THE UNITED STATES TO BE MADE A PARTY DEFENDANT IN CERTAIN CASES.

December 21, 1929.—Referred to the House Calendar and ordered to be printed

Mr. Graham, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 980)

The Committee on the Judiciary, to whom was referred the bill H. R. 980, after consideration reports the same favorably and recommends that the bill do pass

This bill is identical with the bill H. R. 13981, which was favorably reported by this committee in the Seventieth Congress and passed the House by unanimous consent.

This legislation has been recommended for a number of years by the American Bar Association through its committee on removal of Government liens on real estate, the United States League of Local Building and Loan Associations, and by numerous land title companies, in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an *impasse*. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He cannot remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. *He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.* (Emphasis Supplied). Insertion of parentheses is a printers error

Appendix.

The purpose of this bill is to provide a simple and just method of proceeding in such cases; one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government.